[redacted]

Supreme Court, U.S.
FILED
DEC 14 1951
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 496

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

INDEX

PETITION: PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement of Facts 3

Specification of Errors to be Urged 5

Reasons Urged for Granting the Writ 5

BRIEF:

Argument 6

Conclusion 43

TABLE OF CITATIONS

Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518 (1935) 34

Allen, Adm. v. Burdette, et al., 139 O. S. 208 (1942) ... 14

Almeida v. Baldi, et al. (C. A. 3), Opinion March 27, 1952 30

Anderson v. Helmer, 331 U. S. 461, 67 S. Ct. 1340, 1343 33

Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657 (1947) .. 30

PAGE

Bacon v. Howard, 20 How. 22 (1857) 32
Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589 (1935) 31, 38

Calvin v. West Coast Power Co., 44 F. Supp. 783 (D. C. D. Ore., 1942) 14
Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865 (19) 26
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221 (1949) 23, 24, 29, 30
Collins v. Railroad, 11 O. N. P. (N. S.) 251 28

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938) 22, 24, 29, 36

Ferne v. Chadderton, 363 Pa. 191 (1949) 9
First National Bank v. United Air Lines, 342 U. S. 396, 72 S. Ct. 421 (1952) 29, 30, 36, 37, 38, 40, 41

Garrett v. Moore-McCormack, 317 U. S. 239, 63 S. Ct. 246 (1942) 22
Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023 (1941) 23, 24, 30
Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464 (1949) 23, 28, 30

Hartford Life Ins. Co. v. Barber, 245 U. S. 146, 38 S. Ct. 54 (1917) 31
Hawkins v. Barney's Lessee, 5 Pet. 457, 466, 467, 8 L. Ed. 190 32
Hillard, Adm. v. The Western and Southern Life Insurance Co., 168 O. App. 426, 23 O. O. 133 (1941) .. 14
Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980 (1951) 13, 16, 18, 19, 29, 35, 36, 37, 38
Hughes v. Lucker, 174 F. 2d, 285 (1949) 7, 41

PAGE

John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129 (1936) 18, 31

Kenney v. Supreme Lodge, 252 U. S. 411, 40 S. Ct. 371 (1920) 36

Klaxon Co. v. Stentor Co., 313 U. S. 487, 61 S. Ct. 1020 (1941) 23, 24, 25, 28, 30, 36, 40

McElmoyle v. Cohen, 13 Pet. 312 (1839) 32, 34

Modern Woodmen v. Mixer, 267 U. S. 544, 45 S. Ct. 389 (1925) 31, 38

Murray v. P. T. C., 359 Pa. 69 (1948) 9, 10, 11, 12, 14, 36

Ohio General Code Ann., Sec. 105.09-167 ..... 6, 28

Order of United Commercial Travelers v. Wolfe, U. S. 586, 67 S. Ct. 1355 (1946) 31, 32, 34, 38

Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477 (1943) .. 30

Pink v. A. A. A. Highway Express, 314 U. S. 201, 62 S. Ct. 241 (1941) 31, 38

Quaker City Cab. Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 48 S. Ct. 553 (1938) 15

Radobersky v. Imperial Vol. Fire Dept., 368 Pa. 235 11

Ragan v. Merchants Transfer Co., 337 U. S. 530, 69 S. Ct. 1233 (1949) 23, 24, 29

Railway v. Hine, 205 O. S. 629..... 28

Rosenzweig v. Heller, 302 Pa. 279 (1931) 7, 12, 14, 16, 19, 25, 35, 37, 40

Royal Arcanum v. Green, 237 U. S. 531, 35 S. Ct. 724 (1915) 31, 38

Sabol v. Pekoc, 148 O. S. 545, 36 O. O. 182, 76 N. E. 2d 84 28

Sampson v. Channell, 110 F. 2d 754 (C. A. 3, 19, 40) .. 30, 31

PAGE

Sovereign Camp v. Bolin, 305 U. S. 66, 59 S. Ct. 35 (1938) 15, 38
Stegner v. Fenton, 351 Pa. 292 8
Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842) 22
Wells v. Simonds Abrasive Co., No. 10,549, decided 1952 (C. A. 3) 41, 42, 43
Woods v. Interstate Realty Co., 335 U. S. 545, 69 S. Ct. 1235 (1949) 30
11 Amer. Jur. 509, §194 26
8 R. C. L., p. 806, §84 27

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Margaret Quinn, administratrix of the Estate of John M. Quinn, Deceased and Margaret Quinn in her own right, by her attorneys, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on October 21, 1952.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on October 21, 1952. The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A. Section 1254 (1).

QUESTIONS PRESENTED.

1. Where the administratrix of an Ohio decedent brings suit in a United States District Court in Pennsylvania to recover upon a cause of action arising in Ohio out of decedent's wrongful death and does so within the two year period allowed by the law of Ohio does not the full faith and credit clause of the Constitution of the United States require Pennsylvania to apply its two year statute of limitations found in its Act of 1937, July 2, P. L. 2755, 20 P. S. Sec. 772 as amended by the Fiduciaries Act of 1949, Act of April 18, 1949, P. L. 512 Art. VI, §§601, 603, 20 P. S. 320.601, 320.603, rather than the one year statute of limitations found in the Act of April 26, 1855, P. L. 309, 12 P. S. Section 1602?

2. Where the administratrix of an Ohio decedent brings suit in a United States District Court in Pennsylvania upon a cause of action arising in Ohio out of decedent's wrongful death and does so within the two year period prescribed by the Ohio Statute and such two year limitation is part of the substantive laws of the State of Ohio does not the "full faith and credit clause of the Constitution of the United States require the application of the Ohio Statute of Limitations?

3. Where the administratrix of an Ohio decedent brings suit in a United States District Court in Pennsylvania upon a cause of action arising in Ohio out of decedent's wrongful death and does so within the two year period prescribed by the Ohio Statute and such two year statute of limitations is part of the substantive law of Ohio is not an improper interference with the federal jurisdiction for the law to require the application of the statute of limitations of Pennsylvania?

STATUTES INVOLVED.

Ohio General Code, §10509-167.
Ohio General Code, §10509-166.
Ohio General Code, §11235.
Pa. Statutes Act of April 15, 1851, P. L. 669, §18.
Act of April 26, 1855, P. L. 309, §1, 12 P. S. §1602.
Fiduciary Act of 1917, P. L. 447, §35 (a), 20 P. S. §771.
Act of July 2, 1937, P. L. 271, 55, 20 P. S. §772.
Fiduciary Act of 1949, Act of April 18, 1949, P. L. 512, Article 6, §§601, 603, 20 P. S., §320.601, 320.603.
Constitution of the United States, Article IV, §1.
28 U. S. C. A. 1332 (a).

STATEMENT OF FACTS.

Plaintiff's decedent was employed as an electrician for the Steel Improvement and Forge Company in Cleveland, Ohio. On or about May 10, 1948, employees of the Steel Improvement and Forge Company were working with a grinding wheel which had been sold to that company by the defendant, when the wheel exploded, throwing parts of the wheel and metal guard over the wheel about that portion of the plant, with great violence. The decedent was seriously injured and died as a result of those injuries on or about May 14, 1948. This action was commenced in the United States District Court for the Eastern District of Pennsylvania on May 8, 1950.

The delay in instituting this action resulted from the fact

that the defendant could never be served in Ohio because it was not doing business there. Moreover, the decedent had had no direct relationship with the defendant, the wheel having been purchased by the employer of the deceased. The delay in instituting suit was largely the result of the inability of the decedent's widow to determine the identity and address of the defendant.

The defendant moved for summary judgment on the ground that this action was barred by the one-year statute of limitations of the Pennsylvania Act of April 26, 1855, P. L. 309, Section 1, 12 P. S. Section 1602. Plaintiff opposed this motion and moved in the alternative for transfer of this action under 28 U. S. C. A. §1404 (a) to the United States District Court for the Northern District of Ohio. That is, the plaintiff asked that the case be transferred to Ohio only if after consideration of the motion for summary judgment, the Court should conclude that this action could not be sustained in the United States District Court for the Eastern District of Pennsylvania.

On October 31, 1951, the District Court filed an opinion in this action granting the defendant's motion for summary judgment with respect to the plaintiff's cause of action under the Ohio Wrongful Death Statute, Ohio General Code, §10509-167, and denying the defendant's motion for summary judgment with respect to the plaintiff's cause of action under the Ohio Survival Statute, Ohio General Code, §11235. In addition, the opinion denied the plaintiff's alternative motion to transfer this case to the United States District Court for the Northern District of Ohio. An appeal to the United States Court of Appeals to the Third Circuit followed. That Court affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respects:

1. In holding that the full faith and credit clause of the Constitution of the United States did not require the District Court to apply the two years statute of limitations of the State of Pennsylvania found in its Act of July 2, 1937, P. L. 2755, 20 P. S. Sec. 772, as amended for the Fiduciaries Act of 1949, Act of April 18, 1949, P. L. 512 Art. VI, §§601, 603, 20 P. S. 320.601, 320.603.

2. In holding that the full faith and credit clause of the Constitution of the United States did not require the United States District Court apply the substantive two year statute of limitations found in the Ohio Death Statutes.

3. In holding that it was not "improper interference" with federal jurisdiction for the law to require the application of the statute of limitations of Pennsylvania, where the decedent, an Ohio resident was killed in Ohio in an accident which occurred in Ohio.

REASONS URGED FOR GRANTING THE WRIT

1. The United States Court of Appeals (Third Circuit) erroneously interpreted the effect of the full faith and credit clause of the United States Constitution.

2. The United States Court of Appeals (Third Circuit) erroneously limited the jurisdiction of the United States District Court.

3. Your Honorable Court has granted certiorari in the case of *Roberta Wells, administratrix of the Estate of Cheek Wells v. Simonds Abrasive Company* on October 13, 1952, which case involves the exact question present in this case with respect to the full faith and credit clause of the United States Constitution.

4. The opinions of the United States Courts of Appeals are in conflict on questions here presented: *Anderson v. Lintons,* 178 Fed. 2d 304 (C. A. 7th 1949); *Zellmer v. Acme Brewing Co.,* 184 Fed. 2d 940 (C. A. 9th 1950); *Lewis v. Reconstruction Finance Corporation,* 177 Fed. 2d 654 (App. D. C., 1949); *Maki v. George R. Cooke Co.,* 124 Fed. 2d 663 (C. C. A. 6th 1942); cert. den. 316 U. S. 686 (1942); *Wilson v. Massengill,* 124 Fed. 2d 666 (C. C. A. 6th 1942); cert. den. 316 U. S. 686 (1942).

BRIEF.

ARGUMENT.

I. The full faith and credit clause of the Constitution of the United States requires that a two-year statute of limitations be applied in the instant case.

Under the Ohio General Code §10509-167, the statute of limitations in wrongful death cases is two years. This accident occurred on May 10, 1948. It happened in Ohio. The

plaintiff was unable to get service on the defendant in Ohio and brought this suit in the District Court on May 8, 1950 because it was able to obtain service on this defendant here in Philadelphia. Suit was thus brought within the two-year period prescribed by the Ohio Statute. The Pennsylvania wrongful death statute which is known as the Act of April 26, 1855, P. L. 309, 12 P. S. Section 1602, carries a one-year statute of limitations.

It is the position of the defendant that inasmuch as under the law of Pennsylvania a wrongful death action must be brought within one year, and since more than one year elapsed from the date of the occurrence to the time when suit was instituted in this case, the Pennsylvania statute of limitations in its wrongful death statute supersedes and prevails over the statute of limitations of the law of Ohio where the wrong occurred. The defendant cited and the court below relied upon *Rosenzweig v. Heller,* 302 Pa. 279 (1931). That case so held.

We have no quarrel with this case. In fact *Hughes v. Lucker*, 174 F. (2d) 285 (C. C. A. 3rd, 1949), followed and restated the same propositions of law.

If it were true that the plaintiff's sole remedy in Pennsylvania, where alone the defendant may be served, were under the Act of 1855, then it might well be that technical application of *Rosenzweig* would require this Court to deny the plaintiff's widow any recovery despite her inability previously to determine the defendant's identity and location. However, it is submitted that since the *Rosenzweig* case, Pennsylvania death statutes have been materially altered.

Recognizing the utter inadequacy of the remedy provided by the Act of 1855, the Pennsylvania Legislature in 1937 enacted what was called a "survival" statute, Act of 1937, July 2, P. L. 2755, 20 P. S. Sec. 772. As amended by the Fiduciaries Act of 1949 Act of April 18, 1949, P. L. 512 Art. VI, §§601, 603, 20 P. S. §§320.601, 320.603, the Act permits the personal representative of a decedent to recover *all* of the damages that the decedent himself might have recovered

had he survived. The Supreme Court of Pennsylvania, by judicial decision, has determined that a *two-year* statute of limitations applies to the right of action thus conferred upon the personal representative: *Stegner v. Fenton,* 351 Pa. 292 (1945).

While the legislature, in passing this "survival" statute, did not repeal the Act of 1855, it may be conceded that double recovery under the two acts was not intended. Since the right of action conferred by the Act of 1949 upon the personal representative is all-inclusive (i. e., permitting recovery for *all* items which the decedent himself would have recovered had he survived, such as loss of earnings, medical expenses, and damages for pain and suffering), it is obvious that in the first instance the Act of 1949 substitutes a complete remedy in lieu of the Act of 1855, including but not limited to the elements recoverable under that earlier statute.

The failure to repeal the Act of 1855, it is submitted, is explicable only upon one reasonable ground, to wit: The Act of 1949, obviously enures to the benefit of the estate as such and is therefore subject to the claims of creditors of the decedent. If the decedent's estate is insolvent, the decedent's immediate dependents could be protected only under the Act of 1855, which in effect carves out of the general recovery for the estate a limited sum for the special benefit of the particular beneficiaries designated thereby. As between such designated beneficiaries and *creditors* of the decedent, the designated beneficiaries will be preferred provided that, as against such *creditors,* the beneficiaries sue within one year.

If there are no persons falling within the special classes of beneficiaries named in the Act of 1855, such as widows, children or parents, complete recovery against the defendant is permissible under the 1949 Act, so long as such action is started within two years of the accident. But whether suit is brought within one year or not, so long as it be brought within two, it would appear wholly inconsistent with the

beneficent purposes of the combined statutes to hold that an admitted wrongdoer should be enabled to reap any bonanza or windfall from the omission of designated beneficiaries to seek preference as against creditors of the decedent.

That the measure of damages under these statutes, the Act of 1855 and the Act of 1949, is as stated herein is shown by the opinion in *Ferne v. Chadderton,* 363 Pa. 191 (1949).

It is respectfully submitted, that although called a "survival" Act, the Act of 1949 actually is a wrongful death statute and that the statute of limitations applicable thereto completely replaces the original one-year limitation, *except as between the designated beneficiaries and creditors of the decedent.*

That the Act of 1949 is in reality regarded as a wrongful death act by the Pennsylvania Supreme Court is evidenced in a number of ways. In the first place, it has been held that since no duplication of damages was intended, under Pa. R. C. P. 2202 claims both under the Act of 1855 and 1949 "shall be included in one action". See *Murray v. P. T. C.,* 359 Pa. 69, 72 (1948).

In the second place, although prima facie the Act of 1949 purports to give to the personal representative of the decedent, the same rights which the decedent himself would have had had he survived, the Supreme Court in fact has held that this is not so. Thus, for example, the *Murray* case holds that in an action under the survival act, there must be deducted from the recovery the probable costs which the decedent would have incurred for self-maintenance had he survived. But such a deduction is hardly consistent with a "survival" action. It is well established that in any actions by a living injured person for damages resulting from injuries negligently inflicted by the defendant, the measure of damages is based upon potential loss of earnings (plus other special damages and damages for pain and suffering) *without* diminution for amounts which he would normally have spent for self-maintenance (see dissent by Mr. Justice Stern in *Murray* case).

Only in *death actions* does the *Murray* rule apply to require such deduction. Clearly therefore, notwithstanding the "survival" label, Pennsylvania regards the Fiduciaries Act as an enlargement of and substitution for the original wrongful death statute, with a two-year statute of limitations, except as aforesaid as between designated beneficiaries of the decedent and the latter's creditors.

Mr. Justice Stern, in his dissent in the *Murray* case, made the following arguments:

(1) The action authorized under the Act of 1937 (now the Act of 1949) is the same action as that which the deceased might have commenced in his lifetime and governed by the same measure of damages; as interpreted by the majority it was not the same at all (at page 78).

(2) Some states construe their survival statutes as performing the functions of death statutes, but in Pennsylvania the survival action was supposed to be the same action which the deceased might have prosecuted in his lifetime; as interpreted by the majority it will perform the functions of the death actions (at page 81).

(3) The legislature passed the Act of 1937 intending to provide for the estate of the deceased that part of the deceased's probable earnings which he would have been able to spend for his own benefit had his life not been tortiously destroyed (at pages 81-82).

(4) The majority's decision in the *Murray* case results from the confusion between a rule which is appropriate when damages are claimed for the death of another and that appropriate when they are claimed for one's own death; i. e., the majority was making an enlarged death action out of the survival action (at page 83).

Obviously the majority of the Court in the *Murray* case was not swayed by Mr. Justice Stern's arguments set forth

above. Consequently, it is plain that their view of the Act of 1937 was that the legislature did not *intend* a true survival action at all, it was to be but an enlarged death action. The arguments of the dissent were not and cannot be answered. The majority simply took the view that the Act of 1937 was intended to perform the functions of a death act.

The Supreme Court of Pennsylvania only recently has emphasized the difference between a true "survival" act and the Fiduciaries Act in *Radobersky v. Imperial Volunteer Fire Department*, 368 Pa. 235 (1951). In that case the decedent who was seriously injured in a collision with the defendant's fire engine, commenced a personal injury action in his own lifetime. Subsequently he died of the injuries sustained in that accident and his executrix was substituted for him as plaintiff under the survival provision of §35 (a) of the Fiduciaries Act of 1917, P. L. 447, as amended by the Act of April 18, 1949, P. L. 512, Art. VI, §601, 20 P. S. §320.601. This statutory provision is a reenactment of §18 of the Act of April 15, 1851, P. L. 669. The defendant in the *Radobersky* case contended that in computing damages they should be measured according to the rule laid down in the *Murray* case interpreting the Survival Act of 1937 (now the Act of 1949). That is that the present value of the decedent's future earnings should be reduced by the amount which it would have cost to maintain him for the balance of his life. The Supreme Court, in rejecting this argument, held the decision in the *Murray* case applied only to cases under the Fiduciaries Act, and not to cases where the decedent has commenced an action in his own lifetime. Accordingly, it was held that the damages should include the total present value of the decedent's probable future earnings without any reduction. It seems clear that were the Act of 1949, as interpreted by the Pennsylvania Supreme Court, a true survival action, there would be no distinction between the damages in these two types of cases. Thus, the Supreme Court of Pennsylvania recognized again that the Act of 1949

is not a survival act at all but rather another wrongful death act.

As stated by the Supreme Court of Pennsylvania in *Rosenzweig*, at page 285:

> "Statutes of limitations should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth."

The rule is a two-edged sword. Now Pennsylvanians have *two* years in which to bring a death action and recover all that they could ever have gotten under the Act of 1855. In the light of this fact, and the *Murray* case shows it to be a fact, it can scarcely be argued that Pennsylvania has a policy which forces it to apply its statute of limitations in preference to a two-year statute.

Thus no matter whether the Pennsylvania law be applied or not, a two-year statute of limitations is required to be applied.

As shown above, the Pennsylvania Act of 1949, as it has been interpreted by the Supreme Court of this state, is today a "wrongful death" act under which a plaintiff can recover all that he ever could have recovered under the Act of 1855, and in many cases, more. The result is that Pennsylvania now has two wrongful death acts, of which the Act of 1855 is clearly the lesser in importance to plaintiffs in death actions. Therefore, if Pennsylvania is to have the absolute right to apply its own statute of limitations to foreign causes of action, and the plaintiff vigorously denies that Pennsylvania has this right, why should the court apply the statute of limitations of the Act of 1855 rather than that of the Act of 1949? It is submitted that the answer to this problem cannot be reached by simply looking around for a statute in Pennsylvania with a *popular name*, i. e., "wrongful death act," similar to that of the Ohio statute sued upon. To choose

the proper statute of limitations, if a Pennsylvania statute is to be used, the acts with which we are concerned here must be viewed realistically.

The result of the decision of the court below presents the following anomalous situation: If this plaintiff had been able to bring her action in Ohio she would have had two years in which to sue; if the accident had happened in Pennsylvania and the plaintiff had brought her action in this state, she would also have had two years in which to sue; but, where the accident happened in Ohio and the plaintiff was forced to sue in Pennsylvania, she is given, by the court below, only one year in which to bring her action or have it forever barred.

Accordingly, Pennsylvania is, by the decision of the District Court and the Circuit Court, put in exactly the same position as Wisconsin was in *Hughes v. Fetter*, 341 U. S. 609, 71 S. Ct. 980 (decided June 1, 1951). In that case the accident occurred in Illinois. Suit was brought in Wisconsin. Under a Wisconsin statute, suit could only be brought for death occurring in Wisconsin. The case was dismissed. This court reversed on the grounds that the Wisconsin statute violated the full faith and credit clause of the Constitution of the United States. This state permits death actions and permits suit on such actions for just as long a time as does Ohio. But, when an Ohio cause of action comes along, the court below says we will not let you in because you have not complied with the rules of the game. It relies upon the period of limitations set up in the Act of 1855, which statute has now, by the legislature and courts of Pennsylvania, been relegated to the relatively unimportant position of a preference statute. The really significant death act in this state today is the Act of 1949. Plaintiff submits that by taking this position the court disregarded its "constitutional obligation to enforce the rights and duties validly created under the laws of other states" within the meaning of the language in *Hughes*.

It is no answer to any of the contentions urged above to say that Ohio has a Survivor Statute having a two-year statute of limitations like that of Pennsylvania's so-called "Survival Act" and that defendant's motion for summary judgment was denied as to plaintiff's count under that section. Ohio's separate Survivor Act, Ohio General Code, §11235, is a true "survival" statute. Damages thereunder include only pain and suffering, medical and hospital expenses, and loss of earnings *between the time of injury and the time of death. Hillard, Adm. v. The Western and Southern Life Insurance Co.*, 168 O. App. 426, 23 O. O. 133 (1941); *Allen, Adm. v. Burdette, et al.*, 139 O. S. 208 (1942). They do *not* include any loss of earnings based on the decedent's interrupted life expectancy. *Allen, Adm. v. Burdette, et al.*, supra. They do not include funeral expenses. *Hillard, Adm. v. The Western and Southern Life Insurance Co.*, supra. Hence the decision below would prevent the plaintiff from bringing any death action at all, and so results in a denial of the full faith and credit to rights and obligations validly created by the law of Ohio.

This court in reaching the result for which we here contend, will not be deciding a question of state law contrary to the holdings of the highest tribunal of the State of Pennsylvania. *Rosenzweig* was decided before passage of the Fiduciaries Act. Therefore, no court in that state, until the time of the decision below had had occasion to consider the effect of that act, as interpreted by the *Murray* case, on the question of statute of limitations in a death action arising under the law of a foreign state. Certainly prior to the time this action arose, no court in that Commonwealth had had occasion to consider this problem in the light of the arguments urged herein.

It is well established that a federal court is free to decide a question of state law never decided by the highest court of the state. *Calvin v. West Coast Power Co.*, 44 F. Supp. 783 (D. C. D. Ore., 1942). In any event, there can be no

question that in deciding the *Federal Constitutional question involved herein*, this court is not bound by the decisions of the Supreme Court of Pennsylvania. *Sovereign Camp, W. O. W. v. Gillespie, et al.*, 87 F. (2d) 944 (C. C. A. 8th, 1937); *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553 (1938).

II. The full faith and credit clause of the Constitution of the United States requires that the substantive statute of limitations of the State of Ohio in cases of wrongful death be applied.

This case involves the question of the right of any state in this union to set up a policy for its courts which contravenes and fails to recognize the established rights of citizens of other states under the laws of such other states where contracts or rights arise. This question arises under the full faith and credit clause of the Constitution of the United States, Article IV, §1, and the revised Judicial Code which reads that "such acts (of the legislature of any state) and judicial proceedings shall have the same full faith and credit in every court within the United States * * * from which they are taken." 28 U. S. C. A. (1946 Ed. supp. III) §1738).

Here is a young widowed mother and infant child who are the unfortunate victims of the tortious conduct of this defendant, which has availed itself of the free commerce of the United States from Philadelphia to Ohio. Its defective grinding wheel brought on the unfortunate and sudden explosion. Certain rights and remedies were available to this widow under the laws of Ohio, but, unfortunately, she was not able to find, nor is she to this day able to find, this defendant in Ohio. It quietly seeks haven in Philadelphia, free from process that might reach it from any state or federal court in the State of Ohio. There appeared to be no remedy available to this widow until shortly before the

statute of limitations had run. Then she learned of the identity of the defendant, its whereabouts, and the means of bringing it to justice. She instituted this suit in Pennsylvania. It is now argued that Pennsylvania, in its sovereign right, will shield this wrongdoer by its so-called "local policy" of reducing the remedy that would have been available to this widow had she been able to serve process on this defendant in Ohio. The defendant now says that the statute of limitations as set up in Pennsylvania in the Act of 1855, must be the limit of its responsibility or liability even though the impact of its tortious conduct occurred in Ohio where, by the sovereign state of Ohio there is established a two-year statute of limitations, and even though, had the accident happened in Pennsylvania, it could have been sued also within two years. It asserts a so-called public policy, as announced in *Rosenzweig v. Heller,* 302 Pa. 279 (1931).

It cannot be seriously contended that Pennsylvania still has a policy against bringing wrongful death actions more than one year after the time of such deaths. However, assume pro arguendo that *Rosenzweig* is still law and that Pennsylvania decides that it still has a policy which requires it to apply its own rather than a foreign statute of limitations. Can Pennsylvania today declare a policy for itself which fails to give full faith and credit to the laws of a sister state without contravening the Constitution?

This Court has now answered that question in the negative in a case decided by it last spring. *Hughes v. Fetter,* 341 U. S. 609, 71 S. Ct. 980 (decided June 4, 1951). There, the accident occurred in Illinois. Suit was brought in the state court in Wisconsin for the fatal injuries sustained in that accident. Under the Wisconsin statute, there was created a representative action *only* for deaths that happen in Wisconsin. There was thus set forth a local public policy against Wisconsin courts entertaining suits for wrongful deaths that happened in any state other than Wisconsin.

On the basis of that statute, the case was dismissed from the Wisconsin courts. In other words, because of the local policy of the Wisconsin courts, and that of its legislature, which is even stronger, against hearing cases arising out of fatal injuries which happened in sister states, that court dismissed the action although it would have upheld the case had it been an accident which happened in Wisconsin.

This Court held that that statute and the public policy of Wisconsin supporting it were unconstitutional as contravening the full faith and credit clause of the Constitution of the United States, and that Wisconsin cannot provide a remedy for its citizens for wrongs which happened in its own state and refuse to hear matters that happened in other states, which could otherwise have been heard upon proper service in Wisconsin.

In discussing the substantially similar situation there, as here, involving an alleged conflict between the public policies of two states, this Court said, at page 611:

> "We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved."

Accordingly, if Pennsylvania asserts as its reason for its failure to give full faith and credit to the acts of the State of Ohio, its (Pennsylvania's) own local policy, it is up to this court to resolve this conflict. The conflict is thus between Pennsylvania's policy in favor of applying its own statute of limitations to all causes of action no matter where they arise, and the national policy of giving full faith and credit to acts of sister states. We respectfully submit that this court's decision must be in favor of the national policy of full faith and credit, when it is considered that Pennsylvania no longer had any valid reason for its local policy.

This state now allows suits arising out of wrongful deaths up to two years from the time of such deaths, as shown above. Can it then allow a lesser period for similar causes of action arising in another state, which other state likewise allows two years as its period of limitations?

This Court in *Hughes*, speaking of the right of a state to refuse to give full faith and credit to the statute of a sister state, said at page 611:

> "It is also settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent * * *
>
> "We hold that Wisconsin's policy must give way."

The issues involved in *Hughes* are basically present here; to reduce the period of the statute of limitations of a sister state can have the same effect as and be another device for closing the doors of the court altogether on "rights and duties validly created under the laws of other states".

Nor should Pennsylvania be enabled to circumvent *Hughes* by disguising the refusal of full faith and credit for the Ohio statute by the apologia that problems, as to statutes of limitations in wrongful death cases, involve *procedural* or *adjective* law, and therefore have even a greater dignity than Pennsylvania public policy.

Sophisticated as well as obvious denial of full faith and credit has been denounced by the Supreme Court of the United States in *John Hancock Mut. Life Insurance Co. v. Yates*, 299 U. S. 178, 57 S. Ct. 129 (1936), where the court held that the forum had to follow the parol evidence rule of the place of the making of the contract, and that the rules of evidence, though generally considered as adjective law are, nevertheless, "substantive" enough to be able to result in a deprivation of a right; and that, therefore, this forum was obliged to give full faith and credit to the parol evidence

rule of the state where the contract was made even though it was contrary to that rule as it obtained in the forum.

In *Hughes,* this court pointed out that it becomes crucial to make certain that the right is not diminished, particularly where:

> "Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant, and while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service, in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state."

That is exactly our problem in this case. This widow has no means of getting service on this defendant in Ohio. And, therefore, following the rule, as laid down in the *Rosenzweig* case, would lead directly to the result this court sought to prevent by its decision in the *Hughes* case.

The significance of *Hughes* in the instant case is highlighted by Justice Frankfurter's dissent, at pages 618, 619. His reasoning, rejected by the majority, followed that in *Rosenzweig:*

> "But it is neither novel nor with reason. Compare the similar Illinois statute which was before this Court in Kenny v. Supreme Lodge, supra. Wisconsin may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and case construing it. It may not wish to subject residents to suit where out-of-state witnesses will be difficult to bring before the court, and where the court will be faced with the alternative of applying a complex foreign statute—perhaps inconsistent with that of Wisconsin on important issues—or fitting the statute to the Wisconsin pattern.

> The legislature may well feel that it is better to allow the courts of the State where the accident occurred to construe and apply its own statute, and that the exceptional case where the defendant cannot be served in the State where the accident occurred does not warrant a general statute, allowing suit in the Wisconsin courts. The various wrongful death statutes are inconsistent on such issues as beneficiaries, the party who may bring suit, limitations on liability, comparative negligence, and the measure of damages. See Report on the Special Commission to Study the Method of Assessing Damages in Actions for Death (Mass. Sen. No. 430; Dec. 31, 1942) 21 et. seq.; Note (1950), Wis. L. Rev. 354, 360, 363. The measure of damages and the relation of wrongful death actions to actions for injury surviving death have raised extremely complicated problems, even for a court applying the familiar statute of its own State. See Note, 91 U. of Pa. L. Rev. 68 (1940); Oppenheim, the Survival of Tort Actions and the Action for Wrong Death—A Survey and a Proposal, 16 Tulane L. Rev. 386 (1942). These diversities reasonably suggest application by local judges versed in them. Compare Burford v. Sun Oil Co., 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed., 1421; Alabama Public Service Comm. v. Southern R. Co., 71 S. Ct. 762."

Distinctly illuminating is that portion of the quote just made where Justice Frankfurter anticipated the very problem here found in the instant case, when he said:

> "The various wrongful death statutes are inconsistent on such issues as beneficiaries, the party who may bring suit, limitations on liability, comparative negligence, and the measure of damages. * * * The measure of damages and the relation of wrongful death actions to action for injury surviving death have raised extremely complicated problems, even for a court applying the

familiar statute of its own State. * * * These diversities reasonably suggest application by local judges versed in them."

The very reasons advanced, therefore, by Justice Frankfurter for allowing the forum to follow its own inclination in these matters were not accepted by the majority which has now stated the law which controls this court and this case. Pennsylvania is not free to shield its citizens from the performance of their duty of due care or from the responsibilities that flow from its violation where the wrong was done in a sister state which created that duty and the commensurate obligations.

A fortiori does not the Pennsylvania policy violate the Constitution of the United States when it undertakes to provide a remedy that exends for two years for occurrences that take place here, resulting in the wrongful death of persons in Pennsylvania, by whatever name it may be called, whether it be "wrongful death" or "Survival" action, if it will not likewise hear an action brought by an Ohioan by reason of a similar wrongful death, within the same period of limitations, which right was created by the law of Ohio?

No law that necessarily must result in inequity, hardship and unequal conclusions can long persist. It will be repeatedly challenged until ultimately it must fall of its own dead weight.

We must all agree that if each state is to maintain its local sovereignty over subject matter naturally within its scope, and yet be part of the federal scheme of government, a strong and binding full faith and credit clause must be maintained and enforced. And rights created by a state must not be denied, stultified or dwarfed by the courts of sister states, if there is to be a wholesome atmosphere of mutual respect within the federal union. Indeed, this mutual regard for the laws of each must be genuine and realistic and not mere verbiage that ends in contrary results through

supererogation by local refinements in sister courts. The problem is not merely to have the courts of each state faithfully apply the law of the other when jurisdiction of causes of action created by the laws of sister states is accepted by such courts. It further contemplates the need to have the law of each state faithfully applied in the federal courts when, by mere diversity of citizenship, jurisdiction over the cause of action falls into a federal court. And this is so whether the federal court is located in the state creating the right or is far across the continent.

It was an intolerable state of affairs that existed in the days of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842). Under that doctrine a case tried in a federal court, in the same city applied law different from that which obtained in the local state courts on simple local legal problems. It permitted a "shopping" for a favorable jurisdiction. Natural justice dictates that principles of law dealing with local problems should be dictated by the state courts. And when the same issue was litigated in a federal court, by reason of diversity of citizenship, it was only right that the federal court should be obliged to follow the decision of the local state courts on such problems. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938) was thus inevitable.

And equally so, it was only natural that when a state court exercised jurisdiction over a right created by the federal government, as, say, in admiralty, the state courts should be obliged to apply the federal decisional law to those federal rights, rather than have 48 different versions of a national federal policy. And so it was only proper and fitting, within our plan for state and federal governments co-existing as they do, to impose the federal laws on federal questions, whether litigated in federal or state courts. *Garrett v. Moore-McCormack*, 317 U. S. 239, 63 S. Ct. 246 (1942), so holds.

No one can challenge that the rulings in *Erie R. Co. v. Tompkins* and *Garrett v. Moore-McCormack*, supra, were

not only essential but absolutely correct. They properly dovetailed into the federal-state judicial jigsaw picture. But the spirit of reform achieved, may have so imbued us, that we have forgotten that we have always to hold before us the complete jigsaw plan, lest we go too far and let our feeling for one supremacy or another lead us to try to force into place a piece that does not fit, which is alien to our scheme of federal-state governments and their courts. *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 61 S. Ct. 1020 (1941); *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941); *Guaranty Trust Co. v. York*, 326 U. S. 99, 65 S. Ct. 1464 (1945); *Ragan v. Merchants Transfer Co.*, 337 U. S. 530, 69 S. Ct. 1233 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221 (1949), are the troublesome pieces. It is said that they are not limited to what the federal courts must do when considering the local laws of the state within which they sit. From the axiom that a federal court must apply the local law of the state court in which it sits, it is said that the federal court must also apply the conflicts of law rule of the state in which it sits, even when it is considering substantive questions arising under the law of an entirely different state.

From the position thus assumed, this appellee now also suggests, and so far successfully, that in looking to the state conflicts of law rule, the federal court is bound by the state determination of whether the subject matter under review is substantive and therefore controlled by the law of the lex loci, or procedural, and therefore bound by the lex forum. Indeed it says that even if substantive, if it be contrary to local public policy, or is both substantive and procedural, it is still controlled by the lex fori.

To so hold, would we not be overlooking the fact that the local courts are not themselves hearing the case; that they have nothing to do with the facts; and that the rights were created by the laws of a sister state, the federal court sitting by mere diversity of citizenship and the chance presence

of one of the parties where its service can reach him? The state within which the federal court sits did not create the jurisdiction of its federal court. Nor can it enlarge or diminish it. Such jurisdiction was created by an Act of Congress.

There are certain reasonable extensions of *Erie R. R. Co. v. Tompkins,* supra. As enunciations of the fringes of basic law—*Klaxon Co. v. Stentor Co.,* supra, *Griffin v. McCoach,* supra. *Guaranty Trust Co. v. York,* supra, *Ragan v. Merchants Transfer Co.,* supra, and *Cohen v. Beneficial Industrial Loan Corp.,* supra, unadorned by lofty but loosely applied expressions that later return to haunt their creators, are sound. The trouble arises when the lex fori state in which the federal court sits, attempts to assert control over rights elsewhere created, with which the Federal Constitution says the states may not tamper. A serious impasse arises. The glib generalities like "Federal courts are but another court of the state in which they sit" are basically and vitally unsound.

Among the reasons diversity jurisdiction was created, was to enable citizens from distant states or countries to come into a neutral court, protected from local prejudices and privileges, where they might litigate the issues between themselves and local people without having local law added to litigation rooted in the laws of some other state.

All of the just-cited cases had as their intention reasonable *adjective* extensions of the *Erie v. Tompkins* doctrine. That is, that if a case be in a federal court by reason of diversity of citizenship and the cause deals with a right created by the law of the state in which the federal court sits, then the federal court is bound hand and foot to the local law, both as to substantive and procedural law, limited only by the new Federal Rules of Civil Procedure. And if it be a right created under the law of a state other than that in which the federal forum sits, the federal court must apply such local adjective law as the state in which it sits has circum-

scribed upon such rights in its own courts, *provided* it does not thereby vitiate the right itself.

Within those narrow limitations alone is there room for the conflicts of law interplay to which a diversity federal court must recognize local procedure. Beyond it, it runs into the full faith and credit clause and the federal court jurisdictional statutes.

Before a state, or a federal court in its stead, may assume to tamper with such adjective phases of foreign rights, it must look to the lex loci to see how seriously that state treated that adjective remedy. If the lex loci made that which the lex forum thinks is only a "remedy" a part of the right itself, and included it within the creating statute, then the lex forum may not trifle with it at all and must leave it alone, applying it exactly as the lex loci would have done in its own courts.

No field of law lends itself to so much casuistry and doubletalk as conflicts of law. The current fad to make federal courts honor state rights in diversity cases must be carefully limited lest we truly destroy states' rights by creating a Frankensteinian state—the forum state.

Were this statute of limitations a procedural right only and not a part of the substantive right as granted by Ohio's Death Act, then this Court might perhaps, within *Klaxon v. Stentor*, apply the conflicts of law rule of Pennsylvania. In *Rosenzweig v. Heller*, 302 Pa. 279 (1931), the statute of limitations for death actions in New Jersey was included in and was part of New Jersey's wrongful death statute. That closed the door for Pennsylvania to treat that statute of limitations as a mere procedural remedy to which it could apply its own conflicts of law rule. The Pennsylvania Supreme Court admitted the New Jersey statute was substantive. Yet after examining its own death statute, it oddly declared the statute of limitations part of the Pennsylvania act to be procedural, and assumed that that entitled it, as the forum state, to apply its own procedural statute of lim-

itations to that phase of the right to declare its own anomalous conflicts of law rule. It is this unwarranted usurpation of power that highlights the danger of letting the lex fori have any right to vary the statute of sister states to any degree whatsoever from what they are and mean at home.

When the lex fori so trespasses upon a substantive foreign right, it violates the full faith and credit clause of the Federal Constitution. It adds insult to injury to force the federal courts in such fori to have to yield and follow such unconstitutional measures.

It has everywhere else long been the established rule of conflicts of law that if the limitation goes solely to the right created, then the limitation that accompanies the obligation or the right is everywhere that which it had in the state of its creation. *Central Vermont R. Co. v. White*, 238 U. S. 507, 35 S. Ct. 865 (1915). For, it being part of the substantive right, we must go to the substantive law of the lex loci.

In 11 *Am. Jur.* 509, §194 it is said:

> "To the general rule that the remedies, as distinguished from the rights of the parties, are determined by the law of the forum and that the statutes of limitation are part of the remedy, and not of the laws affecting rights, there is an exception in the case in which a statutory liability is sought to be enforced, and the statute prescribes the period of limitation. In this case the general rule adopting the statutes of limitation of the forum is departed from and the limitation prescribed by the act fixing the liability is applicable. The most important class of cases falling within the present exception to the general rule consists of those brought in one state under a statute of a different state giving a right of action for damages for death or personal injuries and containing an express limitation of the time for suit as a condition of the right of action."

In *Central Vermont Ry. Co. v. White*, 238 U. S. 507, at 511, this court said:

"But matters of substance and procedure are not to be confounded because they have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability."

See also 8 R. C. L. p. 806, §84.

This court has held that the substantive time provision operates both to prevent the action where the statute of limitations of the forum is longer and to permit it where the statute of limitations of the forum is shorter. *Engle v. Davenport*, 271 U. S. 33 (1926) was an action which had been brought in the California courts under the Merchant Marine Act as supplemented by the Federal Employers' Liability Act, after one year but before two years had elapsed. The Supreme Court of California held that the one-year statute of limitations of California for personal injuries applied and dismissed the action. This Court reversed on the ground that the two-year statute of limitations contained in the Employers' Liability Act applied, since it was part of the substantive right. The Court said at page 38:

"* * * This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates * * * *And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years.*" (Emphasis supplied.)

There is a conflict on this question in both the District Courts and the Circuit Courts of Appeals: *O'Neal v. National Cylinder Gas Co.*, 103 F. Supp. 720 (N. D. Ill., R. D. 1952); *Anderson v. Linton*, 178 F. (2) 304 (C. A., 7th 1949); *Zellmer v. Acme Brewing Co.*, 184 F. (2) 940 (C. A. 9th 1950); *Lewis v. R. F. C.*, 177 F. (2) 654 (App. D. C. 1949); *McMillen v. Douglas Aircraft Co.*, 90 F. Supp. 670 (S. D.

Calif., D. C. 1950); *Maki v. Geo. R. Cooke Co.*, 124 F. (2) 663 (C. C. A. 6th 1942), cert. den., 316 U. S. 686 (1942); *Wilson v. Massengill*, 124 F. (2) 666 (C. C. A. 6th 1942).

While it is true that the above case involved a right of action given by a Federal statute, the same principle applies under the full faith and credit clause to a provision of substantive right given by a state statute, particularly in view of the recent amendment by Congress to the Judicial Code specifically including State statutes as entitled to full faith and credit in identical terms with those applied to judgments.

In Ohio, the statute of limitations is included within and is a basic part of the Ohio death statute. General Code, Sec. 10509-167 Death Actions. Therefore, we must go to the Ohio law and Pennsylvania must keep its hands off. See Supplemental Appendix.

Thus, in the official digest system in Ohio, Page's Ohio General Code, Annotated, Sec. 10509-167, footnote 8, Limitations reads:

> "The proviso in the act of March 25, 1851 (S. & C. 1139), that the action must be commenced within two years after the death was a condition qualifying the right of action, and not a mere limitation on the remedy. * * * Railway v. Hine, 25 O. S. 629."

To the same effect, see *Collins v. Railroad*, 11 O. M. P. (N. S.) 251.

The provision of G. C. §10509-167 that "Except as otherwise provided by law, every such action [for wrongful death] must be commenced within two years after the death of such deceased person" is a restriction qualifying the right of the action and not merely a time limitation upon the remedy. *Sabol v. Pekoc*, 148 O. S. 545, 36 O. O. 182, 76 N. E. 2d 84.

This Court, as is its practice, decided the cases of *Klaxon v. Stentor, Griffin v. McCoach, Guaranty Trust Co. v. York,*

Ragan v. Merchants Transfer Co., and *Cohen v. Beneficial Industrial Loan Corp.*, supra, within the narrowest possible legal and factual issues. Nuances and inferences have been utilized to expand their holdings. Dicta has of course embroidered them. But when this Court was brought face to face with the impact of the insinuation to which the holdings of those cases had been stretched, and as held here by the Court below, it restored the fabric of their prior opinions to their natural constitutional limitations. So when *Hughes v. Fetter*, 341 U. S. 608, 71 S. Ct. 980 (1951), and *First National Bank v. United Air Lines*, 342 U. S. 396, 72 S. Ct. 421 (1952), came before the Court, it had either to give life to the abnormal shape into which *Erie v. Tompkins* had been stretched, or else restate simple law in simple terms within the bounds intended for *Erie v. Tompkins* when decided.

Recognizing the supremacy of the full faith and credit clause, the historical background of federal diversity jurisdiction, and the common sense realities of two systems of courts living with each other, as well as 48 final appellate courts each jealous of its own prerogatives, this Court held:

(1) that any statute which permits or directs, its state court to refuse to give full faith and credit to the laws of another state is unconstitutional;

(2) that a federal court cannot be compelled to do for a state what the state could not do for itself to the laws of a sister state;

(3) that even if a state court may within the full faith and credit clause deny fulfillment of a remedy it is truly a part of the remedy and the lex loci itself treats it as such; and

(4) even if an improper ruling in respect to these rules of conflict of laws is made by a state court in violation of

specific constitutional strictures, they cannot be imposed on the federal court sitting in that district, as its jurisdiction is not dependent on or to be circumscribed by local regulations, rules or practices in cases dealing with rights attained under the laws of other states. The federal courts will for themselves review the constitutionality of such state court ruling and correct it if need be. See *U. S., ex rel., Almeida v. Baldi, et al.* (C. A. 3), opinion March 27, 1952.

These conclusions put into proper perspective the narrow field, spoken of by Mr. Justice Jackson, that remains of the influence still to be exercised by local conflict of law rules when cases are considered in federal courts. *Klaxon v. Stentor* has been properly delimited and deflated to its intended sphere and no more, and the basic rule that the law of the lex loci must be applied to substantive rights has been restated in the *First National Bank v. United Air Lines* opinion. And that principle is not to be dissipated by calling parts of the rights procedural.

Before this Court reached such cases as *Klaxon v. Stentor, Griffin v. McCoach, Guaranty Trust Co. v. York, Ragan v. Merchants Transfer Co.,* and *Cohen v. Beneficial Industrial Loan Corp.,* the problem was brilliantly analyzed by Judge Magruder, and, step by step, presented for analysis, in *Sampson v. Channell,* 110 F. 2d 754 (C. C. A. 3, 1940). This Court at 313 U. S. 487, 61 S. Ct. 1020, followed the *Sampson* reasoning and reversed the opinion of the Circuit Court in the *Klaxon* case. Feeling its way through an uncharted path, this Court decided a series of cases, in some of which the law of the forum was applied, and in others, the law of the lex loci.[1]

---

[1] Woods v. Interstate Realty Co., 335 U. S. 535, 69 S. Ct. 1235 (1949)—the right to sue without compliance with a local regulation; Angle v. Bullington, 330 U. S. 183 67 S. Ct. 657 (1947)—res judicata; Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477 (1943)—certain conflict of laws rules; Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023 (1941); Klaxon Co. v. Stentor Co., 313 U. S. 487, 61 S. Ct. 1020 (1041)—certain types of statutes of limitations; and Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464 (1945)—Statute of limitations in equity actions.

In all of these cases, your Honorable Court allowed the view of the forum state on those particular problems to prevail. However, a careful analysis of what was there before the Court is of major importance. In those cases, the Court had before it either a case where the right was created in the very state within which the federal court sat, or some peculiarly remedial issue relating to a right created elsewhere and as to which the creating state had expressed no concern. The particular phase of the litigation in such latter cases had not been a part of the creating statute that gave rise to the right. It was thus possible to fit those cases within the narrow limitations within which the forum state can yet exercise its conflicts of law rules without conflicting with the full faith and credit clause of the Constitution of the United States.

As soon as a case arose before this Court where the contrary was true, or the forum sought to bite off what was a part of the substantive right, this Court applied the law of the lex loci and not that of the forum. Indeed, it did so in a major case dealing with the statute of limitations. That was the case of *Order of United Commercial Travelers v. Wolfe*, 331 U. S. 586, 67 S. Ct. 1355 (1946).

As Judge Magruder pointed out in *Sampson v. Channell*, supra, at 759, whenever any case arose where the full faith and credit clause was involved, the Supreme Court immediately held that the law of the lex loci was what applied, and reversed when necessary to achieve that result.[2]

Pennsylvania is bound to honor the law of Ohio and apply its two-year statute. That is, we say it must give full faith and credit to Ohio's law because in Ohio's death statute, the

---

[2] Order of the United Commercial Travelers v. Wolfe, 331 U. S. 586, 67 S. Ct. 1355 (1946); John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129 (1936); Supreme Council of Royal Arcanum v. Green, 237 U. S. 531, 35 S. Ct. 724 (1915); Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589 (1935); Pink v. A. A. A. Highway Express, 314 U. S. 201, 62 S. Ct. 241 (1941); Modern Woodmen v. Mixer, 267 U. S. 544, 45 S. Ct. 389 (1925); and Hartford Life Ins. Co. v. Barber, 245 U. S. 146, 38 S. Ct. 54 (1917).

limitations are specifically included therein and are part of the right created. Ohio treats these limitations as substantive. Pennsylvania must therefore do likewise.

In its brief, the appellee, hereinafter referred to as "Abrasive", has argued that the ancient case of *McElmoyle v. Cohen,* 13 Pet. 312 (1839) (adverse possession), permits each state to apply its own statute of limitations, even though in the state where the right arose, a different statute of limitations exists. They now say that that result follows even when the statute of limitations is part of the creating statute. Abrasive also cites *Bacon v. Howard*, 20 How. 22 (1857), in support of its contention. If the two cases then so held, they are today no longer authority for that proposition.

As we have already noted, this Court, without exception, applied the statute of limitations of the place of the transaction—not that of the forum state, whenever it was made a part of the statute creating the right. *Order of United Commercial Travelers*, supra, was to that same effect. In a dissent, Mr. Justice Black began his opinion by pointing out that the holding of the majority resulted in overruling *McElmoyle v. Cohen*. Without *McElmoyle*, Abrasive has no authority for its position. The opinion, at page 627, says:

> "More than 100 years ago, this Court said that to require a state to apply the 'limitation laws' of another state rather than its own would reduce it 'to a state of vassalage,' presenting the anomaly 'of a sovereign state governed by the laws of another sovereign'. Hawkins v. Barney's Lessee, 5 Pet. 457, 466, 467, 8 L. Ed. 190. A few years later the Court was asked to hold that the full faith and credit clause barred a state from applying its own statute of limitations in a suit brought on a cause of action which had arisen in another state. On that question the Court did not 'entertain a doubt'; the holding was that it could not 'be even plausibly inferred' that the state in which the suit was brought was denied that power by the full faith and credit clause. Mc-

Elmoyle v. Cohen, 13 Pet. 312, 324, 328, 10 L. Ed. 177. While the case then under consideration involved a suit on adjudgment rendered in another state, the broad ruling was that, so far as the full faith and credit clause is concerned, a state has power to apply its own statute of limitations in every kind of action and without regard to where the cause of action arose.

"The constitutional force of the McElmoyle refusal to require a forum state to give full faith and credit to a foreign state's statute of limitations is not weakened in the slightest by the fact that some states have seen fit to adopt 'borrowing statutes.' See Anderson v. Helmers, 331 U. S. 461, 67 S. Ct. 1340, 1343, at note 3. For other states, notably South Dakota here, have adopted statutes with purposes quite opposite to that of borrowing statutes. And under the McElmoyle rule, whichever limitations policy a forum state chooses to follow—to borrow or to refuse to borrow—it is free, so far as the full faith and credit clause is concerned, to do so.

"*The plain effect of today's decision is to overrule the McElmoyle case.* And it does so, despite the fact that the holding of that case has never before been cited with disapproval; in fact, that holding has been repeatedly approved and reaffirmed throughout the years since it was decided. The Court distinguishes the McElmoyle rule, and in fact relies generally for its decision upon the line of decisions in which Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384, is the leading case. But the statute of limitations was not in issue in the Mixer case, the case on which it relied, or the cases which have since relied on it. The McElmoyle case was not even cited in the Court's Mixer opinion; nor does anything said in it detract from the rule of the McElmoyle case that states can, despite the full faith and credit clause, apply their own statutes of limitation. Yet the Court now

> treats the Mixer case as controlling and holds that the full faith and credit clause deprives South Dakota of power to apply its own statute of limitations." (Emphasis ours.)

The dissent highlights the extent to which the rule of the *McElmoyle* case has deteriorated. Justice Black, indeed, seems to think that the effect of the *Order of United Commercial Travelers* decision is that in no case may the forum thereafter apply its own statute of limitations to a right of action created elsewhere, and that to do so would be a violation of the full faith and credit clause. We contend that that is true at least when the statute of limitations is part of the creating statute.

The majority opinion specifically recognized the need for diminishing the rule of the *McElmoyle* case, the Court saying, at page 607:

> "* * * These numerous 'borrowing statutes' demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the general statute of limitations of the state of the forum. The full faith and credit clause applied, as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum."

Nor does the case of *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518 (1935), give Abrasive any support. It is true that in that case the forum (California) was allowed to apply its own law to an accident which happened elsewhere (Alaska). But in that case California was also the state where the contract of employment was entered into. Statute of limitations was not the problem in that case. The Court weighed the conflicting

interests of the forum and loci and the nature of the suit. Having done so, it found the forum more than a forum—it was also the locus of the contract from which all else arose.

Perhaps the most significant rule that came from the Alaska case is, that notwithstanding the type of issue involved, a court must consider the conflicting "public policies" of the several states before deciding which shall prevail. Indeed, the effect attained by applying one rule or another should also be considered. The Court must first see if the subject matter really treats of "public policy" at all, and if so, whether the forum really has a public policy clearly opposed to the rule of the state of occurrence. In a sense, the Court must weigh the equities. It is all a question of the weight of the conflicting governmental interests. The attitude of the creating statute is paramount.

The strong current of all these holdings is toward a firm, mutual respect of each state's laws. In *Hughes v. Fetter*, supra, the Court called these "the strong unifying principles embodies in the full faith and credit clause."

What we have been talking about is whether Pennsylvania has the power to screen a right created in Ohio through Pennsylvania's sieve. We have been saying that Pennsylvania's decision in *Rosenzweig v. Heller* is all wrong, and was wrong from the beginning even when written, if measured by today's constitutional law thinking. This, we contend, without regard to the thought previously expressed that assuming the correctness of *Rosenzweig v. Heller*, when written, it is no longer the law today, because the alleged "public policy" of Pennsylvania that limited a right to recover for wrongful death to one year at that time no longer exists in Pennsylvania. Today there is just as long a period to recover damages for the same death in Pennsylvania as there is in Ohio. See Act of 1937, Pennsylvania, as amended 1949, supra. Actually, the ambit of coverage is greater in Pennsylvania than in Ohio. Pennsylvania gives a larger measure of damages and protects a larger class of bene-

ficiaries. See *Murray v. P. T. C.*, 359 Pa. 69 (1948). Suppose Pennsylvania had reduced the statute of limitations to one week? One day? One hour? Would it not be closing its doors altogether? How far can it go? When this Court considered this question in *Hughes v. Fetter*, supra, it pointed out, in footnote No. 4, at page 611:

> "The parties concede, as they must, that if the same cause of action (which Wisconsin had refused to hear at all) had previously been reduced to judgment, the Full Faith and Credit Clause would compel the courts of Wisconsin to entertain an action to enforce it. Kenney v. Supreme Lodge, 252 U. S. 411, 40 S. Ct. 371."

In *Hughes v. Fetter*, supra, the Court found a case one step less developed than *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 S. Ct. 371 (1920). The case had not yet been tried or reduced to judgment. The Court nonetheless held that the full faith and credit clause protected that Illinois-created cause of action against the peccadilloes of the local Wisconsin forum.

Finally, in *First National Bank v. United Air Lines*, 342 U. S. 396, 72 S. Ct. 421, this Court reached and overcame a further challenge to the full faith and credit clause. The bulge of *Erie v. Tompkins* and its progeny has now been repelled even further by the firm and immutable force of the full faith and credit clause. As pointed out by Mr. Justice Jackson in his concurring opinion in *First National Bank v. United Air Lines*, supra, there was at all times but a very narrow area, even under *Erie v. Tompkins*' brightest star, *Klaxon v. Stentor*, within which local state regulation could expand and influence the laws, judgments and decisions of sister states.

First National Bank v. United Air Lines was a simple wrongful death that occurred in Utah. Suit was brought by an Illinois administrator of the Illinois victim, against

the air line, a Delaware corporation. The case was filed in a federal court sitting in Illinois. The Illinois statute closed Illinois state courts to death actions arising outside the state if service could have been obtained in the state of occurrence (Utah). Utah provided rights of action for death claims. Service could have been had there against the air line. The district court dismissed, and the Court of Appeals affirmed on the ground that since the Illinois statute closed its state courts to such actions, the federal court in that state could not entertain the action either. It distinguished *Hughes v. Fetter*, supra, on the ground that unlike Wisconsin, Illinois did not refuse to hear the case altogether. This Court reversed, holding the Illinois statute unconstitutional as violative of the full faith and credit clause in not honoring Utah's death statute, even though Illinois did not, as in *Hughes v. Fetter*, close the doors of its courts *entirely*, as the Wisconsin statute tried to do. That whittling away of the Utah rights was held unconstitutional and the compromise potion did not cure that fatality.

Here, Pennsylvania does not close its doors entirely, either. But it is still a whittling away by half. It imposes a calendar and time clock to beat which would not be imposed on a Pennsylvania widow if her husband were killed in Pennsylvania. Whether the door be closed altogether, or whether it be but partially shut, be it by a changed measure of damages or by reduced statutes of limitations, the fact remains that Pennsylvania does not give to Ohio's statute the full faith and credit to which it is entitled, when Pennsylvania deprives this widow of any of the relief Ohio would have given her.

In retrospect, this new decision renders more apparent the unconstitutional nature of Pennsylvania's original holding in *Rosenzweig v. Heller*, supra. *Hughes v. Fetter* and *First National Bank v. United Air Lines*, supra, force Pennsylvania to give this widow all that Ohio gives her. True, ours is a statute of limitations case and these two last-cited

cases are not. But *Order of Commercial Travelers v. Wolfe*, supra, did involve a statute of limitations problem—six months at the state of contract as against six years in the forum. In that case, this Court cited a series of cases which were likewise not statute of limitations cases, but which analyzed the principles of constitutional law dealing with full faith and credit, in complete analogy and apposition to the reasoning of *Hughes v. Fetter* and *First National Bank v. United Air Lines*, which we cite today. The Court, in *Order of Commercial Travelers v. Wolfe*, supra, a statute of limitations case, cited *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589 (1935); *Sovereign Camp v. Bolin*, 305 U. S. 66, 59 S. Ct. 35 (1938); *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 62 S. Ct. 241 (1941); *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531, 35 S. Ct. 724 (1915); and *Modern Woodmen v. Mixer*, 267 U. S. 544, 45 S. Ct. 389 (1925), as authority, to hold that "full faith and credit" required the forum to honor the statute of limitations of the lex loci. *None* of those cases involved a statute of limitations question either. But the basic principle of constitutional law was the same as in those cases and this one now before the Court.

In recapitulation, we think that the constitutional law problem may be narrowed down to this: there is a very limited field only within which the state conflicts of law rule can at any time apply. Never can it apply when the right considered is one created by the law of another state —a right to which that law gives great significance and importance. The test to determine whether the lex loci considers the particular remedy an important item is whether it was incorporated within the statute creating the right in the first instance. Whenever that takes place, per se, the lex fori loses all power to interfere with that remedy. The nature of the right involved is important if the forum's conflict of laws rule is predicated upon an alleged public policy. It must pass strict scrutiny to be certain that it is logical,

reasonable and violative of the constitutional protections already mentioned. It must be a genuine public policy which the forum itself abides by, in cases arising under its own law. And when the case arises in a federal court, there should be all the less reason for being willing to subserve a right created elsewhere to the rule of a local court which will never directly hear or decide the case. This is that case. Pennsylvania has no local public policy against the two-year statute of limitations for recovery of damages where a fatality has occurred; Pennsylvania itself grants two years within which to recover damages for a tortious death. Labels mean nothing. The family still recovers for the death.

III. It is improper interference with federal jurisdiction for the law to require a federal court to apply the statute of limitations of the state in which they are sitting to a cause of action arising in another state where the statute of limitations of the state where the cause of action arose is part of the substantive law of that state.

Another constitutional objection to the ruling below deals with the improper interference with federal jurisdiction, achieved by imposing Pennsylvania procedural law on this federal court.

What we have been considering up to this point is what law applies when we start suit in a Pennsylvania state court and not in a federal court. Even if this Court were to hold that the one-year statute applies, because it disagrees with our view of the full faith and credit clause, the Court must also determine whether such ruling does not violate the constitutionally created and statute-implemented federal jurisdiction in such cases. This case deals not alone with what Pennsylvania must do with respect to the law of Ohio, but also whether a United

States Court, sitting in a state other than the lex loci, must uphold and enforce the laws of the state of the lex loci against a contrary view taken locally by the courts of the state within which it sits, when to fail to do so is to let the forum ride herd over federal jurisdiction powers.

This is an action in a federal court, not a state court. We are not asking Pennsylvania state courts to hear this matter or to have its judges adjudicate its legal problems. No Pennsylvania court will, at any time in the processing of this case through the courts, pass on any phase of it. Yet today, because of a strained reading of *Klaxon v. Stentor*, supra, this federal court has been asked to graft upon the facts of this case what is said to be the anomalous state of Pennsylvania law as enunciated in *Rosenzweig v. Heller*, supra, decided in 1931, or six years before the Act of 1937 in Pennsylvania amending the Fiduciaries Act. Under that Act, a suit to recover damages for wrongful death may be maintained today if brought within two years of the accident. We are in the United States court by reason of diversity of citizenship, which jurisdiction is granted by 28 U. S. Code Annotated §1332(a). Pennsylvania had nothing to do with this, nor has it power to affect the results in this federal court proceeding, when the effect would be a negation of federal jurisdiction.

As Mr. Justice Jackson, in his concurring opinion in *First National Bank v. United Air Lines*, supra, said, at page 422:

> "* * * state law is powerless to enlarge, vary or limit this requirement (diversity jurisdiction)."

The holding that a state cannot refuse to hear a case arising under the law of a sister state, imposes on it the duty of applying to it the law of the sister state when it does hear it. When a federal court hears it, the state of the forum should be utterly unimportant as to basic rights elsewhere created.

In a simple tort case, *First National Bank v. United Air Lines,* supra, Mr. Justice Jackson has this to say, at page 423, as to what law the federal forum must apply when hearing a case from a sister state:

> "* * * I believe, as expressed in Hughes v. Fetter, that the State was free to refuse this case a forum, but, if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah, because all elements of the wrong alleged here occurred in Utah. For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred. Order of United Commercial Travelers v. Wolfe, 331 U. S. 586, 6 S. Ct. 1355, 91 L. Ed. 1687; John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. Ed. 106.
>
> "There is undoubtedly some area of freedom for state conflicts law outside the requirements of the Full Faith and Credit Clause. In such matters, unreached by constitutional law, the state rule would prevail in a diversity court. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. But if a transaction is so associated with one jurisdiction that the Constitution compels any forum in which the transaction is litigated to apply the law of that jurisdiction, *is it not the Constitution instead of state conflicts law which determines what law the federal court shall apply?*" (Emphasis ours.)

The impact is terrific. *First National Bank v. United Air Lines* collides head on with the decision of the Circuit Court of Appeals for the Third Circuit in *Hughes v. Lucker,* 174 F. 2d 285 (1949); *Wells v. Simonds Abrasive Co.,* No. 10,549, decided 1952 (C. A. 3), and this case.

The Supreme Court of the United States has clearly left open this phase of the problem, but its direction is clear. To permit the result reached by the District Court below to continue is to permit a forum state to revise the federal jurisdictional laws and subject them to the limitations prescribed by the states—even when the case before the Court has no physical or legal connection with the forum and is not being heard in its courts. This result obviously cannot stand.

IV. This case involves the exact question that is found in Wells v. Simonds Abrasive Company in which case your Honorable Court granted certiorari on October 13, 1952.

Whatever may be the decision on the merits of this case, certiorari certainly should be granted. On October 13, 1952, your Honorable Court granted certiorari in the case of *Wells v. Simonds Abrasive Company*. In that case the same Circuit Court decided that although the accident happened in Alabama and suit was brought under the Alabama Wrongful Death Statute within two years as provided for by that statute, the Pennsylvania one year statute of limitations barred the action. There is no distinction between the question raised in that case and the question here raised.

In addition to the question raised in the *Wells* case under the full faith and credit clause of the Constitution, the appellant here also wishes to raise the question of the interference with federal jurisdiction. Because of the similarity of the two cases and the questions involved therein, your petitioner respectfully requests that your Court grant certiorari in this case and that both the *Wells* case and this case be argued at the same time.

CONCLUSION.

Summarizing the arguments, they are these:

1. Pennsylvania has no policy which precludes suits for wrongful death happening within its borders if they are not brought within one year.

2. Pennsylvania is required by the full faith and credit clause of the Federal Constitution to apply the substantive statute of limitations found in the Ohio law to an accident happening in Ohio.

3. It is an improper limitation on federal jurisdiction for a United States Court sitting in Pennsylvania to apply the Pennsylvania statute of limitations to a cause of action arising in Ohio when Ohio has a statute of limitations which is a substantive part of the Wrongful Death Acts.

4. The same question raised in this case is also raised in the case of *Wells v. Simonds Abrasive Company* in which your Honorable Court allowed certiorari on October 13, 1952.

Respectfully submitted,

RICHTER, LORD & FARAGE,
By B. NATHANIEL RICHTER,
Counsel for Plaintiff.

Office - Supreme Court
FILED
JAN 24 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

No. 496.

October Term, 1952.

MARGARET QUINN, Administratrix of the Estate of JOHN M. QUINN, Deceased, and MARGARET QUINN, in Her Own Right,
Petitioner,

v.

SIMONDS ABRASIVE COMPANY, Successor to ABRASIVE COMPANY OF PHILADELPHIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

PHILIP PRICE,
1320 Packard Building,
Philadelphia 2, Pa.,
Attorney for Respondent.

BARNES, DECHERT, PRICE,
MYERS & RHOADS,
Of Counsel.

TABLE OF CONTENTS OF BRIEF.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Argument	3
Summary	3
I. The Pennsylvania Act	4
II. In Pennsylvania All Death Actions Are Alike Held Subject to the One-Year Limitation of the Death Act of 1855	8
III. The Full Faith and Credit Clause Has Not Been Violated	9
Appellee's Appendix (Statutes Referred to in Respondent's Brief)	23
Pennsylvania Statutes	23
Wrongful Death Act	23
Survival Act of July 2, 1937	24
Ohio Statutes	24
Survival Act	24
Wrongful Death Act	25

TABLE OF CASES CITED.

	Page
Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532 (1935)	20
Angel v. Bullington, 330 U. S. 183 (1947)	16
Atchison, Topeka & Santa Fe Ry. v. Sowers, 213 U. S. 55 (1909)	20
Atlantic Coastline R. R. Co. v. Burnette, 239 U. S. 199 (1915)	19
Bacon et al. v. Howard, 20 How. 22 (1857)	10
Bank of Alabama v. Dalton, 9 How. 522 (1850)	10
Bank of the United States v. Donnally, 8 Pet. 361 (1834)	11
Bauserman v. Blunt, 147 U. S. 647 (1893)	11
Bradford Electric Co. v. Clapper, 286 U. S. 145 (1932)	20
Campbell v. Haverhill, 155 U. S. 610 (1895)	11
Campbell v. Holt, 115 U. S. 620 (1885)	15
Central Vermont Ry. v. White, 238 U. S. 507 (1915)	19
Christmas v. Russell, 5 Wall. 290 (1866)	11, 12
Cohen v. Beneficial Loan Corp., 337 U. S. 541 (1949)	16
Danzer & Co. v. Gulf R. R. Co., 268 U. S. 633 (1925)	19
Davis v. Mills, 194 U. S. 451 (1904)	18
Echon v. Pennsylvania Railroad Co., 365 Pa. 529, 76 A. 2d 175 (1950)	6, 8
Ferne v. Chadderton, 363 Pa. 191, 69 A. 2d 104 (1949)	5, 6
First National Bank of Chicago v. United Airlines, Inc., 342 U. S. 396 (1952)	19
Fisher v. Hill, 368 Pa. 53, 81 A. 2d 860 (1951)	6
Foley v. The Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517 (1949)	6, 8, 9
Funk v. Buckley & Co., Inc., 158 Pa. Super. Ct. 586, 45 A. 2d 918 (1946)	4, 5

TABLE OF CASES CITED (Continued).

	Page
Glenn v. Liggett, 135 U. S. 533 (1890)	11
Great Western Telegraph Company v. Purdy, 162 U. S. 329 (1896)	11
Griffin v. McCoach, 313 U. S. 498 (1941)	20
Guaranty Trust Co. v. York, 326 U. S. 99 (1945)	10
Hanger v. Abbott, 6. Wall. 532 (1867)	11
The Harrisburg, 119 U. S. 199 (1886)	17
Hughes v. Fetter, 341 U. S. 609 (1951)	19
Hutchings v. Lamson, 96 Fed. 720 (7th Cir. 1899)	8
Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941)	16
M'Cluny v. Silliman, 3 Pet. 270 (1830)	11
M'Elmoyle v. Cohen, 13 Pet. 312 (1839)	10, 11, 19, 20
Michigan Insurance Bank v. Eldred, 130 U. S. 693 (1889)	11
Murray v. P. T. C., 359 Pa. 69, 58 A. 2d 323 (1948)	5
Order of Travelers v. Wolfe, 331 U. S. 586 (1947)	11, 12, 20
Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493 (1939)	20
Pezzulli v. D'Ambrosia, 344 Pa. 643, 26 A. 2d 659 (1942)	4, 5
Piacquadio v. Beaver Valley Service Co., 355 Pa. 183, 49 A. 2d 406 (1946)	5, 6
Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 (1949)	9
Roche v. McDonald, 275 U. S. 449 (1928)	12
Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931)	8, 9
Stafford v. Roadway Transit Co., 165 F. 2d 920 (3rd Cir. 1948)	8
Stegner v. Fenton, 351 Pa. 292, 40 A. 2d 473 (1945)	5
Townsend v. Jemison, 9 How. 407 (1850)	12
Walsh v. Mayer, 111 U. S. 31 (1884)	11
Western Fuel Co. v. Garcia, 257 U. S. 233 (1921)	11

STATUTES AND AUTHORITIES CITED.

Page

Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254) 1

Constitution of the United States, Art. IV, Sec. 1.... 2

Fiduciaries Act of 1949, Act of April 18, 1949, P. L. 512, art. VI, § 603, 20 P. S. § 320.603 et seq. 4

Goodrich-Amram Procedural Rules Service, § 2201-38 4

Ohio Survival Act, 8 Ohio Gen. Code Ann. § 11235 ...2, 3, 4

Ohio Wrongful Death Act, 7 Ohio Gen. Code Ann. §§ 10509-166 and 10509-167 .....2, 3, 4

Pennsylvania Survival Act. Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772 .....2, 3, 4, 5, 6, 7

Pennsylvania Wrongful Death Act. Act of April 15, 1851 P. L. 669 § 19, 12 P. S. § 1601; Act of April 26, 1855, P. L. 309, § 1, as amended, Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602, Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603 2, 3, 4, 5, 6, 7,

Restatement of Conflict of Laws 10

Restatement of Conflict of Laws, Section 397 13

Restatement of Conflict of Laws, Section 603 .....10, 11

Restatement of Conflict of Laws, Section 604 ..12, 13, 14, 15

Restatement of Conflict of Laws, Section 605 13

IN THE

Supreme Court of the United States.

No. 496.

October Term, 1952.

MARGARET QUINN, ADMINISTRATRIX OF THE ESTATE OF JOHN M. QUINN, DECEASED, AND MARGARET QUINN, IN HER OWN RIGHT,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY, SUCCESSOR TO ABRASIVE COMPANY OF PHILADELPHIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is unreported.

The opinion of the Court of Appeals for the Third Circuit is reported in 199 F. 2d 416 (1952).

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. §1254).

QUESTION PRESENTED.

Whether in a diversity action for a wrongful death which occurred in Ohio, brought by an Ohio administratrix in a Federal Court sitting in Pennsylvania, a Federal Court may apply the applicable limitation provision of the forum, which is shorter than that provided by the law of Ohio, without violating the full faith and credit clause of the United States Constitution.

STATUTES INVOLVED.

The statutes involved are:

The Ohio Wrongful Death Act. Ohio General Code, Sections 10509-166 and 10509-167 (Appendix p. 25).

The Ohio Survival Act. Ohio General Code, Section 11235 (Appendix p. 24).

The Pennsylvania Wrongful Death Acts. Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 (as amended), 12 P. S. Sections 1602 and 1603 (Appendix pp. 23, 24).

The Pennsylvania Survival Act. Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772 (Appendix p. 24).

The Constitution of the United States, Article IV, Section 1.

ARGUMENT.

Summary.

Ohio and Pennsylvania both have Wrongful Death Acts and Survival Acts. They are printed in the Appendix to this brief at pp. 23 to 26. Suits under both Ohio acts may be brought within two years after the death; but in Pennsylvania a suit under its Survival Act may be brought within two years after the death whereas a suit under its Wrongful Death Act must be brought within one year after the death.

Petitioner brought actions under the Ohio Death Statute and the Ohio Survival Statute in the United States District Court for the Eastern District of Pennsylvania more than one year and less than two years after her decedent's death. The District Court dismissed the Wrongful Death Action because not brought within the time prescribed by the applicable Pennsylvania Statute of Limitations, and the Court of Appeals for the Third Circuit affirmed the judgment. The Survival action is still pending and undisposed of.

The Pennsylvania Courts have held that death actions brought in Pennsylvania for deaths occurring elsewhere must be brought within the one-year period of limitation which is applicable to death actions brought in Pennsylvania to recover for deaths occurring in that state. This being a diversity action the Courts below applied the Pennsylvania rule and held that, since the death action could not have been maintained in a Pennsylvania court because brought more than one year after the death, it could not be maintained in a Federal court sitting in Pennsylvania.

Petitioner has sought to confuse the Pennsylvania Death Statute and Survival Statute, and the different rights of action which they create, differences which the Pennsylvania Courts have always carefully observed, and thereby to gain in her death action the benefit of the two-year period

of limitation of the Pennsylvania Survival Act and to avoid the one-year limitation of the Pennsylvania Death Act. The Courts below, following the law of Pennsylvania as declared by its Supreme Court, held that the one-year limitation of the Pennsylvania Death Act barred Petitioner's suit under the Ohio Death Act, but that her suit brought under the Ohio Survival Act had been brought in time.

In thus giving effect to the period of limitation of the forum the courts below did nothing in conflict with the full faith and credit clause of the Constitution.

I. The Pennsylvania Act.

The Pennsylvania Wrongful Death Act (Appendix pp. 23, 24), consists of statutes enacted in 1851 and 1855, which, in Pennsylvania, are treated together as one Act. Suit must be brought within one year after death "and not thereafter." This is the only statutory basis for the "true action for wrongful death." *Goodrich-Amram Procedural Rules Service,* § 2201-38. It establishes a right of action in certain named beneficiaries to recover damages accruing to them because of the decedent's death. *Pezzulli v. D'Ambrosia,* 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Funk v. Buckley & Co., Inc.,* 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946).

The Pennsylvania Survival Act of 1937[1] (Appendix p. 24), provides for the commencement and prosecution by the personal representative of an action for fatal injuries to the decedent. This is not a "death statute" in any sense of the word but merely enables the decedent's per-

1. The provisions of this act are now embodied in the Fiduciaries Act of 1949, Act of April 18, 1949, P. L. 512 art. VI, § 603, 20 P. S. § 320.603. It is referred to in this brief as the Act of 1937 because all the pertinent Pennsylvania cases cited herein make reference to the Act of 1937 and not to the Act of 1949. It is, however, the same Act referred to in Petitioner's brief as the Act of 1949, but which even the Petitioner sometimes refers to as the Act of 1937. (See Petitioner's brief p. 11).

sonal representative to bring a separate suit on the right of action for personal injuries that had accrued to the decedent at common law because of the tort. *Pezzulli v. D'Ambrosia,* 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Piacquadio v. Beaver Valley Service Co.,* 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Funk v. Buckley & Co., Inc.,* 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946).

The Pennsylvania courts have always recognized a clear distinction between the right of action for wrongful death and the right of action under the Survival Act of 1937. *Pezzulli v. D'Ambrosia,* 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Stegner v. Fenton,* 351 Pa. 292, 294, 40 A. 2d 473, 474 (1945); *Piacquadio v. Beaver Valley Service Co.,* 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Murray v. P. T. C.,* 359 Pa. 69, 71, 58 A. 2d 323, 324 (1948); *Ferne v. Chadderton,* 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Funk v. Buckley & Co., Inc.,* 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946). In *Pezzulli v. D'Ambrosia, supra,* the distinction was defined by the Court in the following passage (344 Pa. at p. 647, 26 A. 2d at p. 660):

> "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured *two* actions may be brought after his death (as they were in the present instance) for the recovery of damages—*one* under the acts of 1851 (section 19) and 1855, *the other* under the act of 1937. *Such actions are entirely dissimilar in nature.* (Emphasis supplied.)

This distinction is determinative of the limitation provisions applicable to suits arising under these Acts. In *Stegner v. Fenton,* 351 Pa. 292, 40 A. 2d 473 (1945), the Supreme Court of Pennsylvania held that suits under the Survival Act of 1937 are subject to the two-year statute of limitations while actions under the Wrongful Death Act are subject to its one-year limitation provision. *Id.* at pp. 296,

475. In reaching this conclusion the Court said (351 Pa. at p. 295, 40 A. 2d at p. 475):

> "*By no stretch of the imagination* can the provisions of that act [the Act of 1855] be grafted upon the '*survival*' Act of 1937, supra, which was passed for an entirely different purpose. *The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts.*" (Emphasis supplied.)

In *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A. 2d 406 (1946), the Supreme Court of Pennsylvania distinguished the two types of action in the following language (355 Pa. at p. 185, 49 A. 2d at p. 407):

> "Although they arise out of a common factual background, *the death action under the Acts of 1851 and 1855, is a separate and distinct cause of action from the cause of action for the decedent's injuries which survives his death under the Act of 1937. . . . Different statutes of limitation apply to the two causes of action. The one-year limitation of the Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act.*" (Emphasis supplied.)

The Supreme Court of Pennsylvania has consistently recognized the distinction between the rights of action under the Wrongful Death Acts of 1851 and 1855 and the Survival Act of 1937, not only in respect of the measure of damages recoverable under each, but also of the separate periods of limitation that are applicable to them. See also *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Fisher v. Hill*, 368 Pa. 53, 60, 81 A. 2d 860, 864 (1951). And it has continued to enforce the one-year limitation provision of the Wrongful Death Act. *See Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9, 68 A. 2d 517, 521 (1949).

It is accordingly clear that the numerous statements appearing in Petitioner's brief confusing the Pennsylvania Wrongful Death Act and The Survival Act are wholly unjustified. Examples of these are: "the Act of 1949 substitutes a complete remedy in lieu of the Act of 1855" (p. 8);[2] "the Act of 1949 actually is a wrongful death statute" (p. 9); "Thus, the Supreme Court of Pennsylvania recognized again that the Act of 1949 is not a survival act at all but rather another wrongful death act" (pp. 11-12); "Now Pennsylvanians have *two* years in which to bring a death action" (p. 12); "the Pennsylvania Act of 1949 . . . is today a 'wrongful death' act" and "Pennsylvania now has two wrongful death acts" (p. 12); "if the accident had happened in Pennsylvania and the plaintiff had brought her action in this state, she would also have had two years in which to sue; but, where the accident happened in Ohio and the plaintiff was forced to sue in Pennsylvania, she is given, by the court below, only one year in which to bring her action or have it forever barred" (p. 13); "had the accident happened in Pennsylvania, it could have been sued also within two years" (p. 16); "Pennsylvania has no local public policy against the two-year statute of limitations . . ." (p. 39).

Basing her argument on a misconception of the Pennsylvania law, which was manifest to the court below, Petitioner is trying to apply to her action under the Ohio Death Statute the period of limitation applicable to the Pennsylvania Survival Statute, instead of that applicable to the Pennsylvania Death Statute. Since the Pennsylvania Survival Statute creates a different right of action for the benefit of a different class of persons than does the Pennsylvania Death Statute, the courts below held that this could not be done.

---

2. Page references are to pages of Petitioner's brief.

II. In Pennsylvania All Death Actions Are Alike Held Subject to the One-Year Limitation of the Death Act of 1855.

The Pennsylvania decision which held that the Act of 1855 provided the period of limitation for all death actions brought in Pennsylvania Courts is *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). That case expresses what is still the law of Pennsylvania and holds that the Act of 1855 is a statute of limitation that operates not only on rights of action for wrongful death arising in Pennsylvania but also on those arising in other states which are sought to be enforced in Pennsylvania.

In the course of the opinion the court said (pp. 285, 348):

> "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth"

and again on pp. 286, 348, quoting from *Hutchings v. Lamson*, 96 Fed. 720, 721 (7th Cir., 1899):

> "It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred."

Thus Pennsylvania wrongful death actions are barred if not instituted within one year after the death, *Stafford v. Roadway Transit Co.*, 165 F. 2d 920, 923 (3rd Cir., 1948); and see *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950), following *Rosenzweig v. Heller;* and foreign wrongful death actions are likewise subject to the one-year limitation provisions of the Pennsylvania Wrongful Death Act. See *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1 68 A. 2d 517 (1949) in

which the court said pp. 10, 522, following *Rosenzweig v. Heller:*

> "As to the Statute of Limitations, a suit on a cause of action created by a statute which limits the time in which an action may be brought must be started within that time, but if the law of the forum provides a shorter period the action must be brought within the period thus prescribed: Goodrich on Conflict of Laws, p. 171, § 86; Wharton on Conflict of Laws, Vol. 2, 3d ed., p. 1264; Restatement, Conflict of Laws, § 603 and comment a; *Rosenzweig, Administratrix v. Heller,* 302 Pa. 279, 281, 282, 153 A. 346."

Thus Petitioner's argument appearing on pages 21 and 37 of her brief that to apply the Pennsylvania one-year statute of limitations would violate the full faith and credit clause because that would constitute discrimination against an Ohio resident is based on a completely false premise. The courts below correctly interpreted the Pennsylvania law to be that anyone, resident or non-resident, may bring a Wrongful Death action in Pennsylvania within one year and a Survival Action within two years, but that the period of limitation applicable to one action is not applicable to the other.

III. The Full Faith and Credit Clause Has Not Been Violated.

The policy of Pennsylvania as expressed in the interpretation given its Wrongful Death Act in *Rosenzweig v. Heller* and in the above quotation from *Foley v. The Pittsburgh-Des Moines Co.* is of the kind which has heretofore been held, under the federal diversity jurisdiction, to be the duty of federal courts to enforce. *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U. S. 530 (1949). The object of the diversity jurisdiction is to insure that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State

court." *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945). Thus, state statutes of limitation are given the same effect in the federal courts in diversity cases as they would be given in the state courts.

Nor is this rule any different because the cause of action was created by the laws of another state, which give a longer time to bring such a suit than does Pennsylvania. This Court has uniformly and consistently held that the statute of limitations of the forum is controlling and may constitutionally bar an action even though it is not barred in the state whose laws created it. No case has been found in which this Court has ever expressed a contrary opinion, and certainly none has been cited by Petitioner. Thus, although one or two lower courts, not however on constitutional grounds, have held that the limitation of the lex loci must be given effect by the courts of the forum even though the lex fori would have barred the action, the conflict of laws rules contained in the *Restatement of Conflict of Laws* are expressive of those that have heretofore been recognized by this Court as valid and not in conflict with the full faith and credit clause.

The first of the three general rules on the subject contained in the *Restatement* is:

> "If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose." (§ 603)

As early as 1839 this Court furnished the basis for that rule by holding that the full faith and credit clause did not require a federal court in Georgia to entertain a diversity suit on a South Carolina judgment after the statutory limitation of Georgia had run, even though the judgment was still valid and enforceable under the law of South Carolina. *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839). A like result was reached in *Bank of Alabama v. Dalton*, 9 How. 522 (1850), and in *Bacon v. Howard*, 20 How. 22 (1857).

This rule, which makes the limitation of the forum controlling, even though shorter than that of the state where the cause of action arose, is based upon and is the natural development of the general rule, which was early recognized by this court, that the statute of limitations of the forum is binding on all litigants. Thus, in *M'Cluny v. Silliman,* 3 Pet. 270 (1830) this Court said, pp. 276-7:

> "It is a well settled principle, that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction."

That rule received such general acceptance that it has been regularly followed in this court and its validity recognized in opinions which did not even suggest a constitutional doubt. Thus in *Bank of the United States v. Donnally,* 8 Pet. 361 (1834), the Court said pp. 372-3, "for the laws of the latter [the forum] must govern as to the limitation of suits in its own courts. . . ."

To the same effect are *Hanger v. Abbott,* 6 Wall. 532, 538 (1867); *Walsh v. Mayer,* 111 U. S. 31, 35 (1884); *Glenn v. Liggett,* 135 U. S. 533, 547 (1890); *Bauserman v. Blunt,* 147 U. S. 647, 652, 654-5 (1893); and *Western Fuel Co. v. Garcia,* 257 U. S. 233 (1921).

The general rule and that announced in *M'Elmoyle v. Cohen* became firmly fixed so early in the history of this Court that they have never been questioned and *M'Elmoyle v. Cohen* has been cited only with approval. See for example *Christmas v. Russell,* 5 Wall. 290, 300 (1866); *Michigan Insurance Bank v. Eldred,* 130 U. S. 693, 696 (1889); *Campbell v. Haverhill,* 155 U. S. 610, 618 (1895); *Great Western Telegraph Company v. Purdy,* 162 U. S. 329, 339 (1896); *Order of Travelers v. Wolfe,* 331 U. S. 586, 607 (1947). In the latter case § 603 of the *Restatement* was also quoted with approval.

Thus not only in respect of acts of the legislature, but also in respect of judgments, this Court has uniformly held that the forum may constitutionally limit the time within which actions may be brought in its courts.

The second of the three rules as expressed in the *Restatement* is:

> "If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose." (§ 604)

The earliest case in this Court that has been found which gave recognition to this rule is *Townsend v. Jemison,* 9 How. 407 (1850). Although the question was not directly adjudicated as it was in *Townsend v. Jemison,* the validity of the rule was also recognized indirectly in *Christmas v. Russell,* 5 Wall. 290 (1866) and *Roche v. McDonald,* 275 U. S. 449 (1928), in that the judgments given full faith and credit in those cases had been obtained in another state after the lex loci had barred the action.

The rule was more recently recognized in *Order of Travelers v. Wolfe,* 331 U. S. 586, 607 (1947), where § 604 of the *Restatement* was quoted with approval. The Court also called attention, however, to the so-called "borrowing statutes", under which states sometimes voluntarily limit themselves to a period of limitation shorter than their own but existing in the jurisdiction where the cause of action arose.

Thus, in general, the law of the forum is controlling, even though it grants a longer period within which to sue than the general law of the jurisdiction in which the cause of action arose, but if a state chooses to borrow a shorter period of limitation from the lex loci it may do so. In other words, the Courts of the forum are not ordinarily required to close their doors to litigants earlier than their own laws provide.

However, there is an exception to this general rule, which is expressed in the *Restatement* as follows:

> "If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has

elapsed, no action begun after the period has elapsed can be maintained in any state." (§ 605)

A corollary of this is the provision applicable expressly to the limitation of actions for wrongful death. That reads as follows:

> "A recovery under a death statute of the place of wrong cannot be had in any state after the time fixed in the statute for bringing an action has elapsed." (§ 397)

Although it is sometimes said that the reason for this third rule is that the period of limitation is a part of the right and, therefore, is itself substantive rather than procedural, actually it is not a question either of substance or procedure or even of conflict of laws, but is merely a matter of determining whether or not the right sued on exists. Where the period of limitation is incorporated in the statute, either directly or by particular reference, the common construction is that the right itself expires with the period of limitation, and does not survive lacking only an effective means of enforcement. It is for this reason that § 604 of the *Restatement* is inapplicable. Since the right itself has ceased to exist by its own terms, it is obvious that it cannot be enforced in any court, not because of any question of comity, or of recognizing the validity of a substantive provision contained in a foreign statute, but merely because there is no right left to enforce. When it has expired by its own terms the act is just as dead as if it had been repealed; and since, in respect of foreign death statutes which create rights unknown to the common law, the forum has nothing to enforce if no enforceable right exists in the jurisdiction where the accident occurred, there is no right left to be enforced after the lex loci has ceased to be effective.

It is therefore proper to limit the time within which a suit may be brought to the period of limitation attached to the right, even though it is shorter than that authorized by the forum, but this does not justify enlarging the period of limitation created by the law of the forum merely be-

cause the statute creating the right itself authorizes a longer period within which to sue. Giving effect to a shorter period contained in the statute creating the right does not mean that one statute of limitations prevails over another statute of limitations. The question is whether or not a right exists at all and not which of two statutes of limitations is controlling. The latter situation is covered by § 604 of the *Restatement,* and where the lex loci provides a general period of limitation of actions and not a particular limitation which operates to *terminate* the right in question, the right may be enforced in the forum if the latter has a longer period of limitation than the state in which the cause of action arose.

Thus the mere fact that a right is unenforceable after it has ceased to exist is no sound reason for declaring that the forum *must* extend its period of limitation to equal that contained in the statute creating the right. Of course it *may* do so, either by appropriate action of its legislature or by judicial construction, but this court has never held that the Constitution demands that it *must* do so. Nor is this merely a matter of inadvertence or because the question has never arisen. An analysis of the situation makes it obvious that what is designed as a provision to *terminate* a right of action so that it may not be enforced anywhere cannot reasonably be interpreted as an attempt to require another jurisdiction to enlarge its statute of limitations and so to subordinate its policy to that of some other state.

Obviously a statutory provision that a right shall not exist for more than two years gives to the right no greater standing than if there had been no limitation at all. A right is certainly not substantively greater, because limited in time, than is one which has no time limit and continues forever. The substance and validity of each are the same for as long as each lasts. Yet not even the Petitioner suggests that if Ohio had created a right and had provided no limit in time for its enforcement the Pennsylvania courts would have had to remain open forever to entertain an action based upon the Ohio statute.

There is no magic in a "built-in" statute of limitations. It is intended to be a limitation in time beyond which a right does not exist anywhere, but it is certainly not, either in terms or purpose, a provision designed to enlarge the time within which the courts of another state must give effect to the right to which it is applicable. It would indeed be a novel doctrine that required all 47 other states to accept the statute of limitations of one as against their own merely because that one made its limitation apply to a single right rather than to all similar rights. Thus the only difference between such a special limitation and a general limitation is that the right to which the former is attached can be enforced both in its own jurisdiction and elsewhere only within the time specified, whereas all other rights may be enforced elsewhere as long as any other state will entertain an action on them, even though that is longer than the lex loci permits. See *Restatement* § 604. But the mere fact that the jurisdiction creating the right provides that it may not be enforced anywhere after a specific time, no matter how much longer the statutes of limitations of other jurisdictions may be, cannot reasonably be interpreted as an attempt to force other jurisdictions to entertain suits based on the right for a longer time than their own policy, as evidenced by their own statute of limitations, permits. A *limitation* of time for the enforcement of an action is not an *extension* of the time for the enforcement of an action and the existence of a limitation upon the life of a right cannot give it more validity, at home or abroad, than it would have had without such a limitation.

This Court long ago held that the time within which a right of action may be enforced is not a matter of substance, *Campbell v. Holt,* 115 U. S. 620 (1885) and whether or not such limitation is "built in" to the statute creating the right does not change its nature. It is certainly no less reasonable to allow a state to fix the time within which suits may be brought in its own courts than it is to require a plaintiff to comply with local requirements before bring-

ing his action. In *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541 (1949) a stockholder's derivative diversity action against a Delaware Corporation in a New Jersey federal court was held to be subject to New Jersey's requirement for security for costs. In the course of the opinion the Court said (p. 552):

> "A state may set the terms on which it will permit litigations in its courts."

and again (p. 554):

> "A plaintiff cannot avail himself of the New Jersey forum and at the same time escape the terms on which it is made available, if the law is applicable to a federal court sitting in that State . . ."

Expressive of the same principle, i. e. giving effect to local policy so long as that policy does not affect the *substance* of the right being enforced, this court said in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 498 (1941):

> "Here, however, § 480 of the New York Civil Practice Act is in no way related to the validity of the contract in suit, but merely to an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law as they see fit. . . . The full faith and credit clause does not go so far as to compel Delaware to apply § 480 if such application would interfere with its local policy."

Similarly in *Angel v. Bullington*, 330 U. S. 183 (1947) a diversity suit brought in North Carolina for the purchase price of Virginia land, the Court said (p. 192):

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders

is not to effect discrimination against the great body of local citizens.'' (Emphasis supplied.)

A state should not be required to enforce against its own citizens rights which, as a matter of its own policy as formally declared by its legislature, have been barred by the lapse of time. This has nothing to do with the substance of a right created by a statute which may still be enforced in any other jurisdiction with a longer statute of limitations. Citizens of a state ought to be able to rely on the statutes of limitations of their own state and not be subject to the unknown statutes of limitations of the other 47 states, or perhaps to no limitation at all if another state should create a right which might be enforced without limit in time.

And so it is that in all the cases in which this Court has considered a foreign statute creating a right of action with a ''built-in'' statute of limitations different from that of the forum, it has given it effect only to *reduce* the period within which suit may be brought below that provided for by the laws of the forum, and it has never held that it *enlarged* the limitation of the forum and required the forum to entertain the action longer than its own laws permitted.

In *The Harrisburg,* 119 U. S. 199 (1886), a suit arising out of a death on navigable waters and in which the lex loci and the lex fori each contained a limitation of one year on such actions, the Court said, p. 214:

> ''The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.''

It should be observed that in thus describing the effect of a ''built-in'' statute of limitations the Court spoke of the

limitation of the liability alone and did not suggest that a provision limiting liability could be interpreted as one which ***extended*** the time within which suit could be brought in another state beyond that of the latter's period of limitation.

Similarly in *Davis v. Mills,* 194 U. S. 451 (1904), Mr. Justice Holmes said, p. 454:

> "But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates."

This could only mean that the defendant was entitled to take advantage of the shorter period prescribed by the lex loci and does not suggest that the plaintiff would be entitled to the benefit of a longer period if the limitation of the lex fori were shorter.

Of *The Harrisburg, supra,* the Court said (p. 454):

> "But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere."

However, the limitation is spoken of as what it is, a limitation of a right, and not an enlargement of one.

Emphasizing further that a "built-in" limitation is not an enlargement of limitations existing elsewhere, the Court said (p. 457):

> "If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it."

Other cases illustrating this principle are: *Central Vermont Ry. v. White,* 238 U. S. 507 (1915); *Atlantic Coastline R. R. Co. v. Burnette,* 239 U. S. 199 (1915); and *Danzer & Co. v. Gulf R. R. Co.,* 268 U. S. 633 (1925).

All of these cases give the effect to a "built-in" statute of limitations which was obviously intended, but do not suggest that it should have any effect other than to destroy the right as distinguished from merely suspending the remedy. To say that a right expires if not exercised within two years after its creation is far different from saying that all other 47 states must make their courts available for the enforcement of such a right for two years even though their own laws require the enforcement of a similar right by their own citizens in their own courts within one year.

Petitioner relies on *Hughes v. Fetter,* 341 U. S. 609 (1951), and *First National Bank of Chicago v. United Air Lines, Inc.,* 342 U. S. 396 (1952), but those cases did not purport to deal with the question here presented. It was held in *Hughes v. Fetter* that a state which has a wrongful death statute of its own cannot completely close the doors of its courts against a suit based upon a similar statute of another state, and the slight factual difference in the *United Air Lines* case did not make inapplicable the same constitutional obligation. Since the forum furnished courts competent to adjudicate the rights of action created by the laws of another state, it could not refuse to do so upon the same terms as it adjudicated similar rights created by its own laws, and the entertainment of such suits and the enforcement of such rights obviously did not offend against the policy of the forum. See 341 U. S. at p. 612. However those cases dealt with the *substance* of the right and did not suggest that the doctrine of *M'Elmoyle v. Cohen* was being affected in any way. They did not intimate that the forum must require its courts to entertain such a suit for a period of time longer than it does for plaintiffs whose causes of action arise under its own laws, and since this

court has never so held, it may not reasonably be supposed that the long line of cases beginning with and based upon *M'Elmoyle v. Cohen,* have been overruled without even a passing mention of them.

States have not heretofore been required to subordinate their own public policy and to act in respect of their own citizens contrary thereto merely in order to give effect to the policy of another state. See *Atchison, Topeka & Santa Fe Ry. v. Sowers,* 213 U. S. 55, 67-8 (1909); *Bradford Electric Co. v. Clapper,* 286 U. S. 145, 160 (1932); *Klaxon Co. v. Stentor Co.,* 313 U. S. 487, 498 (1941); and distinguish decisions based on the provisions of corporate charters or constitutions of societies, *Order of Travelers v. Wolfe,* 331 U. S. 586 (1947), or on contracts, *id.* p. 608.

In *Alaska Packers Assn. v. Industrial Accident Commission,* 294 U. S. 532, 542 (1935) and in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U. S. 493, 502 (1939), California was not required to subordinate its public policy to that of Alaska and Massachusetts, both of which had statutes which purported to provide an exclusive remedy for the two accidents in question. In the latter case the Court said (p. 502):

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute,* applicable to persons and events within it, *the conflicting statute of another state,* even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." (Emphasis supplied.)

In *Griffin v. McCoach,* 313 U. S. 498 (1941), it was said (p. 507):

> "Where this Court has required the state of the forum to apply the foreign law under the full faith

and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."

It is submitted that it would not only be obnoxious to the public policy of Pennsylvania, and to the practice which has had the uniform approval of this Court for over 100 years, but unreasonable and unjust to hold a resident of Pennsylvania subject to suit in the courts of Pennsylvania by a non-resident, suing on a foreign cause of action, for a period of time longer than he would be subject to answer a like suit by one whose cause of action arose in Pennsylvania.

It is accordingly submitted that the Petition should be dismissed.

Respectfully submitted,

PHILIP PRICE,
13th Floor, Packard Building,
Philadelphia 2, Pa.,
Attorney for Respondent.

BARNES, DECHERT, PRICE,
MYERS & RHOADS,
Of Counsel.

APPENDIX.

STATUTES REFERRED TO IN RESPONDENT'S BRIEF.

Pennsylvania Statutes.

Wrongful Death Act.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children, or parents of the deceased shall be entitled to recover, whether he, she, or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other state or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.

The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after death, and not thereafter. Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.

Survival Act of July 2, 1937.

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. Act of June 7, 1917, P. L. 447, § 35 (b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.

Ohio Statutes.

Survival Act.

Sec. 11235. WHAT CAUSES OF ACTION SURVIVE. In addition to the causes which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto. 8 Ohio Gen. Code Ann. § 11235.

Wrongful Death Act.

Sec. 10509-166. LIABILITY IN ACTION FOR WRONGFUL DEATH. When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances which make it in law murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state. Every such action brought under this act shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action heretofore commenced or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall be construed to prevent the maintenance thereof. 7 Ohio Gen. Code Ann. § 10509-166.

Sec. 10509-167. PROCEEDINGS. An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children and

other next of kin of the decedent. The jury may give such damages as it may think proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid. 7 Ohio Gen. Code Ann. § 10509-167.

End